

RMcE  
Livingston, NJ

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRIAD WENCO, LLC, D/B/A  
WENDY'S RESTAURANT

and

Case No. 29–CA–165942

FAST FOOD WORKERS COMMITTEE

DECISION, ORDER, and  
NOTICE TO SHOW CAUSE

On July 6, 2016, Administrative Law Judge Joel P. Biblowitz issued a decision in this case. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering letter brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

1. The judge found, applying the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining mandatory arbitration agreements in New York, New Jersey, and Pennsylvania that require employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. \_\_\_, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*,

834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. *Id.* at \_\_\_, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. *Id.* at \_\_\_, 138 S. Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court’s decision in *Epic Systems*, which overrules the Board’s holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the arbitration agreements are unlawful based on *Murphy Oil* must be dismissed.<sup>1</sup>

2. There remains the separate issue whether the Respondent’s arbitration agreements independently violate Section 8(a)(1) of the Act because they interfere with employees’ ability to access the Board. The Respondent excepts to the judge’s finding that the arbitration agreements are unlawful because employees would reasonably believe they bar or restrict them from filing unfair labor practice charges with the Board and/or restrict their access to the Board’s processes. See *U-Haul Co. of California*, 347 NLRB 375, 377-378 (2006), *enfd.* 255 Fed. Appx. 527 (D.C. Cir. 2007).

At the time of the judge’s decision and the Respondent’s exceptions, the issue whether maintenance of a work rule or policy that did not expressly restrict employee access to the Board violated Section 8(a)(1) on the basis that employees would reasonably believe it did would have been resolved based on the prong of the analytical framework set forth in *Lutheran Heritage*

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<sup>1</sup> We therefore find no need to address other issues raised by the Respondent’s exceptions to the judge’s decision regarding this allegation.

*Village-Livonia*, 343 NLRB 646 (2004), that held an employer’s maintenance of a facially neutral work rule would be unlawful “if employees would reasonably construe the language to prohibit Section 7 activity.” *Id.* at 647. Recently, the Board overruled the *Lutheran Heritage* “reasonably construe” test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017).

Accordingly, we sever and retain this complaint allegation, and we issue below a notice to show cause why the allegation that the arbitration agreements unlawfully restrict employee access to the Board should not be remanded to the judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.

#### ORDER

The complaint allegation that the maintenance of the arbitration agreements unlawfully restricts employees’ statutory rights to pursue class or collective actions is dismissed.

Further,

**NOTICE IS GIVEN** that any party seeking to show cause why the issue whether the Respondent’s mandatory arbitration agreements unlawfully restrict employee access to the Board should not be remanded to the administrative law judge must do so in writing, filed with the Board in Washington, D.C., on or before October 17, 2018 (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C. October 3, 2018.

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JOHN F. RING, CHAIRMAN

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LAUREN McFERRAN, MEMBER

(SEAL)

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WILLIAM J. EMANUEL, MEMBER

NATIONAL LABOR RELATIONS BOARD